JAAFAR BIN DERIS v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) April 7, 1956]

[K. B. — Criminal Appeal No. 24 of 1956]

Accomplice — Non-disclosure by prosecution that one of their witnesses was an accomplice.

In this case the appellant, who hired a trishaw and then sold it, was convicted of criminal breach of trust. One of the prosecution witnesses, who had previously been convicted and sentenced for voluntarily assisting in disposing of the trishaw, which he knew or had reason to believe was stolen property, was put before the Court without disclosure of the fact that he was an accomplice.

The learned Judge commented adversely on such non-disclosure and pointed out that the prosecutor should have elicited in examination the fact that the witness had been convicted and sentenced and thus enable the Court to decide on the credibility of his evidence, bearing in mind that he then had nothing to gain by giving false testimony on behalf of the prosecution.

CRIMINAL APPEAL.

Lim Cheng Poh for the appellant.

Syed Hamzah bin Tahir (Federal Counsel) for the respondent.

Rigby J. (delivering oral judgment) : — The appellant in this case was convicted by the learned Magistrate, sitting at Kota Bharu, of criminal breach of trust, contrary to section 406 of the Penal Code.

The brief facts of the case are that on the 29th of August he hired a trishaw from the complainant. Under the agreement he was to pay rent for the hire of the trishaw to the complainant, either daily or after an interval of a few days. He failed to do so. In fact, it would appear that on the day after he hired the trishaw, with the assistance of another man called as a witness for the prosecution, he sold the trishaw to a third party for the sum of $37.

The evidence against him at the trial consisted of the witness who assisted him in selling the bicycle, together with the purchaser.

I am now informed that the person who assisted him in selling the bicycle, on the 5th of October — nineteen days before the appellant himself was tried — was convicted in the Magistrate's Court of voluntarily assisting in disposing of property, to wit, a bicycle — this same bicycle — which he knew or had reason to believe to be stolen property. He was sentenced to six months' imprisonment. It would seem abundantly clear from the record that this witness was put before the Court as a perfectly honest witness, and the fact that he was in fact clearly an accomplice in disposing of the bicycle and that he had been convicted and sentenced as such, was never brought to the notice of the trial Court. It is deplorable that this should be so. Quite clearly, it was the duty of the prosecution, when calling this witness before the Court, to elicit from this witness at once that he had been an accomplice in disposing of the property, and that he had been convicted and sentenced as such. If this had been done, then the Court, although considering him as an accomplice, would have been in a position to decide as to the credibility of his evidence, bearing in mind the fact that he had already been convicted and sentenced and, therefore, had nothing to gain by giving false testimony on behalf of the prosecution. I repeat, quite clearly this should have been done by the prosecution.

I have some doubt whether in the circumstances I ought not to allow this appeal. But even assuming, as indeed was clearly the case, that this witness was an accomplice and that his evidence required corroboration, such corroboration is in fact to be found in the evidence of the purchaser, in respect of whom no suggestion is made that he had any guilty knowledge that the bicycle that he was in fact purchasing was stolen property.

The conviction is accordingly confirmed and the appeal against conviction is dismissed.

The sentence is reduced from one of twelve months' imprisonment to six months' imprisonment, to run as from the date of conviction.

Appeal dismissed.

Solicitors : *Pillai, Lim, Lee & Hwang.*

Re RAMASAMY CHETTIAR; KRISHNAN CHETTIAR v. SALAKSHI ACHI & ORS.

[O. C. J. (Storr J.) December 21, 1955]

[J. B. — Originating Summons No. 20 of 1952]

Hindu law — Will — Direction to widows to adopt — Failure to adopt — Whether intestacy arises.

In this case the testator in his will directed his two widows to adopt, which they have failed to do. The facts further showed that they had no intention to adopt. The issue before the Court, in view of that failure, was: "Does an intestacy arise and, if so, as to what part of the testator's estate?"

Held: as there was no gift over in the testator's will, there was an intestacy with regard to the residue of the estate of the testator.

Cases referred to :—

(1) *Varada Narayana Aiyangar v. Vengu Ammal & Ors.* I.L.R. 1938 Mad. 621; (1938) 2 Mad. L.J. 613.

(2) *Bamundoss Mookerjea v. Mussamut Tarinee* (1858) 7 Moo. I.A. 169.

(3) *Uma Sunduri Dabee v. Sourobinee Dabee* I.L.R. 7 Cal. 288.

(4) *Prasannamayi Dasi v. Kadambini Dasi* (1868) 3 Beng. L.R. (O.J.) 85, 90.

APPLICATION.

Sandy G. Pillay for the applicant.

A. N. Mitra for the 4th respondent.

J. E. Lloyd for the 2nd and 5th respondents.

1st and 3rd respondents, not appearing.

Storr J. : —The issue before the Court was: "In view of the events that have passed, that is, the two widows of the Testator, namely, Salakshi Achi (first widow) and Paripooranam Achi (second widow) have failed to adopt in pursuance of the Testator's directions under his Will and have no intention to adopt, does an intestacy arise and, if so, as to what part of the Testator's estate?"

Mr. Sandy G. Pillay appeared for the Applicant, Mr. A. N. Mitra for the 4th respondent, and Mr. J. E. Lloyd for the 2nd and 5th respondents. The 1st and 3rd respondents did not enter appearances.

Having considered the arguments of and the authorities cited by Counsel, the affidavits of (1) RM. AR. Meyyappa Chettiar, (2) AL. ST. K. Kaliyappa Chettiar, and (3) Annamachi (f), the Testator's Will, and the judgments delivered by the full Bench of the High Court of Madras in *Varada Narayama Aiyangar v. Vengu Ammal and two others.*[1], I have come to the conclusion that the answer to the issue before the Court is that there is an intestacy with regard to the residue of the estate of the testator.

In the case referred to above, the facts and the arguments of Counsel were very similar to the present case. In that case there were very strong directions in the Will of the Testator that his widow should adopt his nephew or, if the nephew's father refused to give his son in adoption, she should adopt another boy, and it was held that :—

"A widow cannot be compelled to follow her husband's wishes in the matter of adopting a son however strong the directions of her husband might have been and she cannot be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest."

In his judgment Leach, C.J. (now Sir Lionel Leach), with regard to the directions to adopt, said :—

"It is quite clear that the will does not create any trust. It directs that the executors shall remain in possession of the properties and the income during the minority of the adopted son, but it is conceded that if a son had been adopted they would be bound under its terms to hand all the properties over to him on his coming of age. It is also conceded that on this event happening the duty of fulfilling the testator's directions with regard to the annual ceremonies would devolve on the adopted son, and the executors would have no further duties to perform. But it is said that because the widow has refused to adopt it does not mean that she will persist in her refusal. She may change her mind, and that, pending this uncertain event, the executors are in law entitled to remain in possession. I might mention here that the executors also happen to be the reversioners. The argument amounts to this. The properties must remain in the hands of the executors until the death of the first respondent, because until the breath has departed from her body she may change her mind. But a widow cannot be compelled to follow her husband's wishes in the matter of adopting a son; **Bamundoss Mookerjea v. Mussamut Tarinee**[2]. Now, as a Hindu widow cannot be compelled to adopt, however strong the direction of her husband might have been, is she to be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest? The answer to my mind must be in the negative. If she says 'I refuse to adopt', she is entitled to be put in possession of her deceased's husband's estate and it was decided so in a case which resembles in many respects this case; **Uma Sunduri Dabee v. Sourobinee Dabee**[3]. In that case the husband directed by his will that if his wife (who was enciente at the time the will was made) did not give birth to a son, or if she did and the son died, she was to adopt a son. She refused to comply with his direction. It was held that she was entitled to do so and the fact that she did refuse made the direction under the will for all legal purposes non-existent. Cunningham J. observed:

> 'We think, however, that the observations of the Sadr Court must be accepted as favouring the proposition that such a legal obligation cannot be created; and the remarks of Peacock, C.J. in **Prasannamayi Dasi v. Kadambini Dasi**[4] are an authority for the view that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.
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> 'We cannot therefore regard the language of the testator as having created a trust which the widow is legally bound to carry out. She is at liberty to comply with her husband's directions or not as she pleases; and her omission or refusal to do so is no bar to her rights of inheritance. Accordingly the contingency for which the will provides not having occurred, and there being no gift over, the testator must be regarded as intestate and his widow as heiress-at-law entitled to succeed,' "

and Madhavan Nair J. (now Sir Madhavan Nair) in his judgment said :—

"I entirely agree, but as the point of Hindu law argued before us is of some importance and as there has been no express decision by any Bench of this Court I wish to add a few words. Adoption by a Hindu widow is a power which she exercises in her own right, but she exercises that power under direction from her husband or by obtaining the consent of the nearest sapindas. But this power she cannot be compelled to execute. The fact that a boy to be adopted is mentioned in the will of her husband does not, in my opinion, affect the question. In this connection a passage from *Mayne's* Hindu Law may be usefully referred to. The learned author says:

> 'It is no doubt upon the same principle that an express authority, or even direction, by a husband, to his widow to adopt is, for all legal purposes, absolutely non-existent until it is acted upon.'

"I think it may now be taken that the law is well settled that a Hindu widow cannot be compelled to adopt, nor will a suit lie to enforce her to do so. The reason is obvious. Adoption is not a compulsory religious obligation whatever the moral obligation on the widow may be. This being the position, what would be the result if a Hindu widow who was enjoined by her husband to adopt refused to adopt? The texts of Hindu law are

silent on this point; but there are a few decisions on the question and as these have been referred to by my Lord in his judgment, it is not necessary for me to refer to them again. Of course, the position would be different if a trust had been created by the husband in his will. There is no foundation for the argument put forward in this case that a trust has been created under the will. The chief argument urged in favour of the view that the widow is not entitled to get the properties from the executors is, what will happen if the widow adopts at some later stage? The answer is, if she adopts she will then be deprived of the properties and they will vest in the adopted son. The purpose for which the will has been executed by the husband has not been found to be enforceable. In my opinion the property would, on the refusal of the widow to adopt, vest in her."

From these judgments, with which I entirely agree, and the cases cited therein, it is quite clear that as there is no gift over in the present testator's will, there will be an intestacy with regard to the residue.

Order accordingly.

Solicitors: *Sandy G. Pillay; Mitra & Co.; Drew & Napier.*

R. v. CHEW CHONG JIN

[A. Cr. J. (Whitton J.) February 7, 1956]

[Singapore — Criminal Appeal No. 194 of 1955]

Control of Imports and Exports Ordinance, 1950, s. 27 — Prohibition of Imports Order, 1950 — Illegal importation of gold — Abetment — Proof of conspiracy.

This was an appeal against the acquittal of the respondent on a charge of abetting a person or persons unnamed in the illegal importation into the Colony of gold, in contravention of paragraph 2(1) of the Prohibition of Imports Order, 1950 read with s. 27 of the Control of Imports and Exports Ordinance, 1950. The facts as adduced by the prosecution were as follows:

On June 17, 1955 a P.A.A. aircraft landed at Kallang Airport at about 4.45 p.m. Some Customs officers kept observation on the plane. After the passengers' baggage and the mail had been cleared some fitters and the accused who was employed by Pan-American Airways were working on the plane. Accused was seen to enter the plane and come out after two or three minutes. He then mounted a bicycle and rode towards a hangar and disappeared. After about three or four minutes he rode back to the aircraft, and again entered the plane. About two minutes afterwards he came out of the plane, mounted the cycle and rode towards the hangar. He was then stopped by the Customs Officers. Accused produced two heavy brown-paper parcels to the Customs Officers. Later the Customs Officers went to the hangar and in a tool box, the key to which was handed to them by the accused, were found four parcels similar in appearance to the two parcels which the accused had handed to the Customs Officers. The parcels were subsequently found to contain gold. At the time the accused was stopped he had on him a white waistcoat with a number of pockets under his singlet.

The learned District Judge acquitted the accused as he held (a) that there was no evidence to show where the aircraft came from and (b) that the prosecution had failed to establish a *prima facie* case that the accused had engaged in a conspiracy for the importation of gold into the Colony: this being the form of abetment alleged. The Deputy Public Prosecutor appealed.

Held: (1) it is common knowledge that the big international airlines do not operate internally and therefore in the absence of anything in the evidence suggesting some abnormal circumstances, e.g. a forced landing upcountry, there could be no reasonable doubt that the plane in this case flew into Singapore from outside local territorial waters; (2) having regard to all the circumstances there was evidence in this case to raise the *prima facie* inference that at some time before the gold was imported, the accused had become a party to the conspiracy for its illegal importation and therefore the learned District Judge should have called on the accused to enter for his defence.

[**Editorial Note:** The Control of Imports and Exports Ordinance, 1950, is now Chapter 214 of the Laws of the Colony of Singapore, Edition of 1955.]

Case referred to:—

(1) *R. v. Meyrick & Ribuffi* 21 Cr. App. R. 94.

CRIMINAL APPEAL from the District Court.

H. B. Livingstone (Crown Counsel) for the appellant.

L. Rayner for the respondent.

Whitton J.: — This is an appeal by the Deputy Public Prosecutor against a District Court order of acquittal of the respondent on a charge of abetting a person or persons unknown in the illegal importation into the Colony of six slabs of gold, in contravention of paragraph 2(1) of the Prohibition of Imports Order, 1950 read with section 27 of the Control of Imports and Exports Ordinance 1950.

The grounds of appeal are in effect two. Firstly, that the District Judge was wrong in holding that there was no evidence to show where the aircraft came from; secondly, that he was wrong in holding the Crown had failed to establish a *prima facie* case that the respondent had engaged in a conspiracy for the importation of gold into the Colony, this being the form of abetment alleged.

As to the first of these points the Crown produced two pieces of evidence, to wit, the testimony of two Customs Officers as to the arrival at Kallang Airport of the Pan-American Airways plane from which the District Judge was satisfied — quite justifiably in my view — that the respondent had removed the gold, and certain passenger and cargo manifests from which it might be inferred the plane had come from Manila. The District Judge eventually rejected these documents on the ground they had not been proved, and in so doing I think he was correct because, even if the documents had been made in the ordinary course of business within the meaning of section 32(ii) of the Evidence Ordinance, it had not been established that this was one of these cases in which such documents are rendered relevant under section 32. I consider, however, that the learned District Judge either failed to appreciate that it was immaterial whether the plane had come from Manila or from any other particular place once it had been proved it had come from